A Model Act for the Protection of Rights of Prisoners

COMMITTEE ON THE MODEL ACT
FOR THE
NATIONAL COUNCIL ON CRIME AND DELINQUENCY

1972

NATIONAL COUNCIL ON CRIME AND DELINQUENCY

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Foreword

FOR MANY YEARS NCCD has expressed the public's concern over prison disturbances and riots. In the last twenty years our assistance has been requested by various commissions that were established following serious riots. We have participated in surveys conducted by these commissions and have developed legislative as well as administrative responses to the conditions revealed.

Although riots continue to occur—and the abuses to which they are a response still prevail in many places—a new element has been added to prisoner grievances: an assertion both of positive rights and of the right to be protected against abuse. This can be regarded only as a heartening development. The court decisions that have responded to the grievances by granting relief affect the prison system as a whole as well as the individual petitioners. Certainly this mode of seeking redress—through petitions to the court, to administrators, and to legislators—is better than communication by riot.

The Model Act set forth below is an effort to respond positively to the new emphasis in prisoner grievances. It points out that the legislatures thus far have been almost totally unresponsive to prisoner efforts to seek redress in positive ways. At the same time the act is, we hope, a support to courts to which the issue of abuse is presented, and to administrators who can, if they will, avoid both litigation and disturbances by instituting needed reforms, by recognizing that men and women are imprisoned not to be abused—either by other prisoners or by the system—but to be helped. The entire community is better served by treating prisoners humanely than by ultimately releasing persons who are more embittered and callous than when they were committed.

Our thanks go to the distinguished committee that worked with us in producing the Model Act for the Protection of Rights of Prisoners.

—MILTON G. RECTOR
Director, NCCD

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A Model Act to Provide for Minimum Standards for the Protection of Rights of Prisoners

The Need for a Statute

For many years the National Council on Crime and Delinquency has sponsored and published a number of model acts in the fields it deals with—juvenile courts and juvenile delinquency, and the administration of criminal justice and correctional services. We have had a continuing program of developing such models in response to changing conditions—or perhaps to concepts whose implementation has been too long delayed. Thus the Standard Juvenile Court Act has been issued in six editions, since 1925; the seventh edition is in preparation. The Model Sentencing Act, first published in 1963, is being revised.

Over the years we received many communications from prisoners and from their relatives and friends. Most of them were requests for help: e.g., assistance of counsel, assistance in understanding what had happened and what procedures were to be expected, help in their being considered for parole, and help in obtaining a job so that the prisoner could be released on parole.

Nowadays the communications sent by prisoners (or their attorneys) to us —and to others, including the courts —are of a different order. Especially in the last half-dozen years they have been demanding recognition of the rights of prisoners as persons and citizens (citizenship is not lost upon conviction) and a halt to abuses against them. In the past little attention was paid to prisoner complaints of abuses and violations of their rights. Courts adhered to what a leading article in the *Yale Law Journal* in 1963 called the "hands off doctrine," citing a United States court which said: "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[1]

The "hands off" doctrine is no longer an inviolate rule. Courts have begun to supervise prison administration to protect prisoners against abuse and to protect their basic rights, the sources of which are specific provisions of the Constitution. Thus the right to practice one's religion in prison has been protected, the most significant cases being those brought by Black Muslims. The cases are significant also in that the prisoners who violated institutional rules regulating the practice of religion and other matters were punished by whipping or solitary confinement or both. The conditions of solitary confinement were often horrendously cruel. In numerous cases, the courts enjoined solitary confinement, sometimes retaining jurisdiction while awaiting compliance by the prison administration with the court-ordered changes. The Eighth Amendment prohibition against cruel and unusual punishment was applied in these cases; a federal court, for example, ruled that any

[1] Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963). The author notes that the phrase "hands-off doctrine" is taken from Fritch, "Civil Rights of Federal Prison Inmates," a document prepared in 1961 for the Federal Bureau of Prisons. The quotation from the court opinion is from Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

whipping of a prisoner was a violation of the Eighth Amendment.

Newer cases deal with a different order of prisoner rights. They apply the spirit of *Coffin v. Reichard*, a federal case which declared that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[2]

Thus censorship, often needless and degrading, as well as burdensome to the institution, has now come under examination. A federal court said recently that prison authorities "possess no power of censorship"; it held that they could not bar *Fortune News*, the newsletter of the Fortune Society, an organization aimed at creating greater public awareness of the prison system. It said:

> Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights. . . .Censorship is utterly foreign to our way of life; it smacks of dictatorship.[3]

Another court has ruled that "the reading of any outgoing mail from the inmates is . . . in violation of the First Amendment . . . unless pursuant to a duly obtained search warrant." For security reasons it allowed opening of incoming mail, except for mail from attorneys, courts, and public officials.[4]

Generally, however, the courts tend to be cautious about supervision of prisons and, more often than not, reiterate the hands-off doctrine. The breach is widening, but the flow of cases is not gushing.

What the Act Does

To establish the principle of *Coffin v. Reichard*, Section 1 of the Model Act contains language corresponding to that quoted above where the case is referred to.

As an agency concerned with prison reform, we believe that courts concerning themselves with prison abuses are acting properly, not only because they are legally sound in applying the Constitution and in interpreting the nature of imprisonment but also because the abuses of rights are serious. Recent events or disclosures include mass murder of prisoners, widespread self-mutilation in protest against inhuman conditions, and destructive riots. The courts have a responsibility to deal with these conditions, and needed prison reform is occurring as a result of the decisions.

Such action by the courts also supports administrative efforts to correct abuses. Some administrators and wardens have made changes to eliminate abuses without any prodding by courts; but change is difficult, and custodial staff may resist changes that reduce their power. It sometimes also happens that a well-prepared suit and a full hearing may reveal not only abuses but their remedies. Sometimes a prisoner's suit results in a court-supervised conference between complainant and defendant at which agreement on changes is followed by dismissal of the suit.[5] The model statute is intended to encourage administrators to make changes without suit, but where this does not occur, it gives courts the necessary jurisdiction.

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[2] Coffin v. Reichard, 143 F.2d 443, 155 A.L.R. 143 (C.C.A. Ky. 1944).

[3] Fortune Society v. McGinnis, 319 F. Supp. 901 (D.C. So. Dist. N.Y. 1970).

[4] Palmigiano v. Travisono, 317 F. Supp. 776 (1970).

[5] Rhem v. McGrath, U.S.D.C. So. Dist. N.Y., July 30, 1971, 70 Civ. 3962.

Briefly this act states the most onerous abuses occurring in prisons and specifies the courts' powers to deal with them. To those who say that its enactment would further burden the courts, there are two answers:

1. If the abuses exist and the violations of rights are amenable to law, the courts *must* take jurisdiction, just as they do with persons who are not in prison and whose litigation also "burdens the courts."

2. What burdens the courts is not their power to correct an abuse but rather the abuse itself. When the abuses cease or become less heinous, fewer writs will be brought to the courts. But for as long a time as attention is needed, it will be far better to have writs than riots. In 1970 a combination of court decisions and prison riots led the New York legislature to enact a law whose language is somewhat similar to ours:

> No inmate in the care or custody of the department [of correction] shall be subjected to degrading treatment, and no officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection.

The act also goes on to set humane standards for inmates held in confinement in a cell or room apart from other inmates.[6]

Solitary confinement has been the subject of a number of suits, and in many instances prisoners have been ordered released from solitary. In some of these cases the courts have laid down rules that must be followed with respect to conditions in solitary. Solitary confinement has not been declared unconstitutional by any court; nevertheless, it is a destructive experience, probably producing the very opposite of what is intended and surely not rehabilitative. It is justified only where a prisoner requires temporary restraint because of his destructive, irrational pattern at the moment. Section 3 establishes the standards governing its special use.

As already noted, a number of courts have used injunctions and other means of redress.[7] Section 6, which deals with remedies, also authorizes a court to prohibit further commitments to an institution.

Many observers of the relationship between courts and prisons have noted that what the court expects in ordering a commitment—namely, a rehabilitative program—may be quite different from what actually occurs in the institution. Some advocate that, to deal with this discrepancy, judges should be required to visit the institutions to which they commit persons. Though this may well be desirable, it will not of itself provide a remedy. A judge may decide not to commit to a particular institution whose faults he has become familiar with, but other judges will not come to the same conclusion. What Section 6 provides is that where a court makes a finding of a pattern of violation of rights, it may declare the institution "off limits" for further commitments until certain conditions are corrected. Some administrative agencies such as state departments of correction have this power with respect to local jails.

Under some correction acts local jails may also be ordered closed, and Section 6 also gives this power to a court when the necessary findings have been made. Recently a court

[6] N.Y. Laws of 1970, ch. 479.

[7] For a discussion of the development of remedies and the limitations still governing many courts, see Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970), particularly 243 *et seq.*

exercised this power where the conditions were grave; it did not close the institution but allowed it a few months to correct the abuses, meanwhile retaining jurisdiction.

In 1970 the atrocities in the Arkansas prison system led to a decision that the entire system was unconstitutionally operated and could be closed. The prisoners' petition maintained that any confinement in the system was cruel and unusual punishment. The federal district court held:

> As far as the Court is aware, this is the first time that convicts have attacked an entire penitentiary system. . . .The Court sustains the claim that conditions and practices in the Penitentiary System are such that confinement of persons therein amounts to a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

The decision did not order the immediate closing of the institutions; instead the court, retaining jurisdiction, gave the authorities time to eliminate the abuses.[8]

In Philadelphia the Court of Common Pleas found that conditions in the city's Holmesburg Prison were bad enough for the entire institution to be condemned. It ordered the transfer of two prisoners who had filed writs of habeas corpus, and it held jurisdiction for thirty days to enable the prison administration to eliminate the abuses, in default of which it would hear petitions from any prisoners. "Conditions in the prison," it said, "constitute cruel and inhuman punishment."[9]

Another court, in New Mexico, ordered release from the Gallup Detention Center to bring the number of prisoners down to sixty and issued an injunction barring any commitments that would raise the number to more than sixty.[10]

In most instances it is the prisoner's petition to a court that uncovers inhumane treatment. Filing such a petition and presenting sufficient proof face many obstacles. A simpler procedure for prisoner complaints—one that would be more accessible to prisoners and closer to the prison administrator—is established in Section 5, which provides for an autonomous "ombudsman" agency empowered to receive and act on prisoner grievances.[11]

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[8] Holt v. Sarver, 309 F. Supp. 362 (1970), *aff'd* 442 F.2d (8th Cir. 1971).

[9] Bryant v. Hendrick, Philadelphia Court of Common Pleas, Aug. 11, 1970.

[10] Curley v. Gonzales, U.S. Dist. Ct. N. Mex., Feb. 12, 1970.

[11] The ombudsman program is discussed in "Interim Hearing on Desirability of a Correctional Ombudsman," Assembly Interim Committee on Criminal Procedure, California Legislature (1970); Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365 (1968). The Maryland statute sets up an equivalent office in its act for an Inmate Grievance Commission (Session Laws of 1971, ch. 210, added as § 204F in art. 41, Md. Ann. Code).

The Center for Correctional Justice reports as follows on the ombudsman programs in Oregon and Alberta, Can.:

> "These two programs appear to have given all citizens (in Alberta) and prisoners (in Oregon) a way to correct individual cases of injustice, inefficiency or oversight. The Ombudsmen have been successful in cutting through bureaucratic red tape and in assuring that prescribed regulations are followed in specific cases. Officials at the Oregon Penitentiary are convinced that the Ombudsman has contributed to a more stable 'atmosphere.' On the other hand, the Ombudsmen seem to have made little progress in changing the general policies and procedures under which government agencies operate. (For example, Oregon prisoners now have some assurance that the written rules concerning disciplinary procedures will be followed; the rules, however, remain unchanged.) This is not surprising in Oregon, where the prison Ombudsman, after sixteen years' experience as a guard, continues to be responsible to the Superintendent and to

Discovery can also be aided by citizen visitors to institutions. The use of prison visiting has been cited by Chief Justice Warren E. Burger, who noted on one occasion that in the Netherlands a team of trained people visit prisons regularly to "flush out the rare case of miscarriage of justice and the larger number of cases in which the prisoner has some valid complaint."[12] Addressing the Association of the Bar of the City of New York, he commented that lawyers also assume responsibility for reform of prisons:

> Where do you begin? The same way you prepare a case. By getting all the facts, visiting the scene if necessary, and then organizing the evidence. In this area most of the facts are available at the prison and from prison authorities. A visit to most prisons will make you a zealot for prison reform. If you will form a fact-finding party of one judge and two or three lawyers you will soon discover that 75-80 per cent of all prisoners are in substandard institutions.

A prison visiting program has been instituted by the Young Lawyers Section of the American Bar Association.[13]

What the Act Does *Not* Attempt to Do

The purposes set forth above, though important, are quite limited. The act does *not* undertake specification of prison treatment programs that are desirable or should be mandatory, which is the purview of the statutes governing a state department of correction and the administration of prisons. Thus NCCD's Standard Act for State Correctional Services lists numerous programs—vocational training, religion, medical services, etc.—that should or must be given by state departments.[14]

These statutes are the proper locale for a direct statement of practices that

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share most of the basic assumptions of correctional personnel. Recently, the Ombudsman has become frustrated by the necessity of acting as a middleman between inmates and staff and by his lack of independent power to change practices that seem unfair. The inmates express faith in the Ombudsman's sincerity but doubt in his ability to do anything more than 'play politics.'

"The Alberta Ombudsman, a former Commissioner of the Canadian Mounted Police, has made a few steps in the direction of challenging accepted practices. Apparently, he has achieved a large public following and favorable press. However, in a recent case where he questioned the operation of powerful real estate cooperatives, he was subjected to questioning by a specially created committee of inquiry, contrary to statute. In addition, the Ombudsman is the only employee in the province of Alberta who has not received a raise in salary since 1967. We have discovered already that this inability to be completely free of political pressures may plague our project as well." —First Quarterly Progress Report, 1971.

12 New York Times, Feb. 7, 1970.

13 "Officers of the American Bar Association's Young Lawyers Section and several members of the Junior Bar of Texas made a series of visits to Texas prisons last week. This visit was part of the Young Lawyers Section's nation-wide prison visitation program, which is intended to help improve correctional services and conditions by drawing public attention to both the positive and negative aspects of prisons.

"Since last November, section members have toured a dozen prisons. In Texas, they visited units of the Texas Department of Corrections as well as local jails and observed conditions and interviewed inmates, guards and prison officials. . . .

"Prison visits to observe conditions and interview inmates make up the first of three major phrases in the program. The second phase consists of offering legal services to the inmates on both criminal and legal matters. Law schools at the University of Washington and the University of Kansas are already assisting prisoners in such programs. The final phase of the program is the development of prison reform legislation at the federal and state levels." 9 CR. L. REPORTER 2121, May 12, 1971.

14 NCCD, Standard Act for State Correctional Services, 1966.

are prohibited (e.g., corporal punishment, forbidden in the Standard Act for State Correctional Services) and practices that must be regulated (e.g., solitary confinement—specifically, the conditions governing its use).

Some of these statutes also have provisions for inspection of institutions and their closure by administrators. The Model Act does not attempt to add to or affect such provisions. Administrators and wardens have the primary obligation to conduct satisfactory institutions, and the statutes should support their power to do so. When they fail, the Model Act is applicable.

Although the Act recognizes suits by prisoners, it does not undertake to detail any procedural requirements, and it does not deal with assistance of counsel to prisoners in preparation of suits. Such assistance is now most unsatisfactory. "Jailhouse lawyers"—inmates with claimed expertise of a kind—are often the only help a prisoner has, and the courts have not yet required any more. Unfortunately, the drafters of model legislation for public defender services have failed to include the obligation to assist prisoners.

In one prisoner's suit a United States Court of Appeals addressed itself to the clogging of the courts by many prisoners' petitions, most of them perhaps without legal merit, so poorly drawn that the time of the courts and others is wasted but nevertheless leaving unanswered the question of whether legal assistance might have disclosed a meritorious claim. The Court said:

> In the last analysis, however, the problem of petitions for collateral review that are frivolous, incoherent, false because copied slavishly from winning patterns, or otherwise lacking real merit, seems likely to plague the courts until a system is established for providing legal counsel to . . . prison inmates on a reasonably broad basis.[18]

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[18] United States v. Simpson, 436 F.2d 182 (D.C. Cir. 1970).

AN ACT
TO PROVIDE FOR MINIMUM STANDARDS FOR THE PROTECTION OF RIGHTS OF PRISONERS

§ 1. Declaration of Purpose and Intent

The provisions of this Act shall be liberally construed to promote the intent of the Legislature as follows:

(a) The central principle underlying all rules, regulations, procedures, and practices relating to persons imprisoned in accordance with law shall be that such persons shall retain all rights of an ordinary citizen, except those expressly or by necessary implication taken by law.

(b) Such rights include but are not necessarily limited to nutritious food in adequate quantities; medical care; provision for an acceptable level of sanitation, ventilation, light, and a generally healthful environment; housing, providing for not less than fifty square feet of floor space in any confined sleeping area; reasonable opportunities for physical exercise and recreational activities; and protection against any physical or psychological abuse or unnecessary indignity.

(c) Persons in control of custodial facilities for prisoners shall be held responsible for maintaining minimum standards and shall make use of every resource available to them to prevent inhumane treatment of prisoners by employees, other prisoners, or any other persons.

(d) Measures shall be instituted and maintained within such facilities to protect against suicide or other self-destructive acts.

(e) All reasonable methods shall be used to protect against the theft or destruction of such personal property of prisoners as may be permitted in the institution.

§ 2. Inhumane Treatment Prohibited

Inhumane treatment includes but is not limited to the following acts or activities and is hereby prohibited:

(a) Striking, whipping, or otherwise imposing physical pain upon a prisoner as a measure of punishment.

(b) Any use of physical force by an employee except that which may be necessary for self-defense, to prevent or

stop assault by one prisoner upon another person, and for prevention of riot or escape.

(c) Sexual or other assaults, by personnel or inmates.

(d) Any punitive or restrictive measure taken by the management or personnel in retaliation for assertion of rights.

(e) Any measure intended to degrade the prisoner, including insults and verbal abuse.

(f) Any discriminatory treatment based upon the prisoner's race, religion, nationality, or political beliefs.

§ 3. ISOLATION IN SOLITARY CONFINEMENT[18]

A prisoner may be placed in solitary confinement—segregation in a special cell or room—only under the following conditions:

(a) During such confinement, the prisoner shall receive daily at least 2,500 calories of food in the normal diet of prisoners not in isolation.

(b) The cell in which the prisoner is confined in solitary shall be at least as large as other cells in the institution and shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment.

(c) Under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health.

(d) A prisoner may not be confined in a solitary cell for punishment, and may be so confined only under conditions of emergency for his own protection or that of personnel or other prisoners. Confinement under such circumstances shall not be continued for longer than is necessary for the emergency. A prisoner's right to communicate with his attorney or the

[18] Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology,"* 56 IOWA L. REV. 1251 (1971).

person or agency provided for in Section 5 to receive complaints shall not be interfered with.

(e) No prisoner shall be kept in a solitary cell for longer than one hour without the approval of the highest ranking officer on duty in the institution at the time.

(f) No prisoner may be kept in a solitary cell for any reason for longer than forty-eight hours without being examined by a medical doctor or other medical personnel under the doctor's direction.

(g) A log in a bound book shall be maintained at or near any solitary cell or cells, and employees in charge of such cell or cells shall be responsible for recording all admissions, releases, visits to the cell, and other events except those of the most routine nature.

§ 4. DISCIPLINARY PROCEDURE

It is the responsibility of any person or persons in charge of the management of an institution for the confinement of prisoners to develop and describe in writing a fair and orderly procedure for processing disciplinary complaints against prisoners and to establish rules, regulations, and procedures to insure the maintenance of a high standard of fairness and equity. The rules shall prescribe offenses and the punishments for them that may be imposed. Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. A permanent record shall be maintained of all disciplinary complaints, the hearings, and the dispositions thereof.

§ 5. GRIEVANCE PROCEDURE

The director of the State Department of Correction (or the equivalent official) shall establish a grievance procedure to which all prisoners confined within the system shall have access. Prisoners shall be entitled to report any grievance, whether or not it charges a violation of this Act, and to mail such communication to the head of the department. The grievance procedure established shall provide for an investiga-

tion (aside from any investigation made by the institution or department) of all alleged grievances by a person or agency outside of the department, and for a written report of findings to be submitted to the department and the prisoner.

§ 6. JUDICIAL RELIEF

A prisoner or group of prisoners[17] alleging abuses in violation of this Act may petition [appropriate court] for relief. The court may afford any of the following remedies:

(a) It may make a finding that the allegations are without merit.

(b) It may issue an injunction, prohibitive or mandatory, or utilize any other appropriate remedy in law or equity.

(c) It may prohibit further commitments to the institution.

(d) If the abuses are found to be extensive and persistent, it may order the institution closed subject to a stay of a reasonable period, not to exceed six months, to permit the responsible authorities to correct the abuses. If the abuses are not corrected to the satisfaction of the court, it may order those prisoners who have a history of serious assaultive behavior to be transferred to another facility, and it may order the discharge of other prisoners.

§ 7. VISITS TO PRISONERS AND INSTITUTIONS

The director of a department responsible for the operation of an institution or a system of institutions for the confinement of prisoners shall establish rules and regulations permitting attorneys of record, relatives, and friends to visit and talk in private with any prisoner in an institution at reasonable times and under reasonable limitations. The institution may be visited at any time by members of the state legislature, judges of the criminal or appellate courts, the attorney general, and the governor.

Any other citizen may make application to visit an institution and talk in private with prisoners if the applicant estab-

[17] On petitions signed by next of friend, see Note, *Habeas Corpus vs. Prison Regulation, a Struggle in Constitutional Theory*, 54 MARQ. L. REV. 50, 54-59 (1971).

lishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution.

If application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution.

APPENDIX A

Booklet
A Model Act
for the
Protection of Rights of Prisoners

APPENDIX B

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